Synopsis of the criminal opinions by the Mississippi Court of Appeals on July 1, 2008.

Kea v. State, No. 2006-KA-01383-COA (Miss.App. July 1, 2008)

CRIME: Perjury
DECISION: Reversed and remanded
COUNTY: Simpson
MAJORITY: Carlton

FACTS: Albert J. Kea was convicted of perjury and sentenced to 8 years. In May of 1998, Kea's house burned downed. (He had been hospitalized for a week prior to the fire). He settled with the insurance company, but later filed suit against Entergy, claiming that its faulty transformer was the cause of the fire. Kea sought to recover damages for the loss of various collectibles and antiques lost in the fire. He provided a list of the items to Entergy during discovery. Prior to trial, Kea's son Bob contacted Entergy and informed them that the items listed were not destroyed, but were in fact at his house in Colorado. Entergy recovered the items, but did not inform Kea. At trial, Entergy called Bob as a witness. The case was dismissed because the items were never destroyed. Kea was subsequently charged with perjury since he had testified the items were destroyed. Bob claimed the items were never in Kea's house and in fact, the items belonged to him and his wife. Kea presented several witnesses who testified they saw the items in his house prior to the fire. Bob denied being in Magee the week before the fire or taking any of the items. He claimed he was in Turkey with his wife and submitted their passports as evidence.

HELD: Although the defense did not submit a "two-witness" instruction on perjury, the trial judge committed reversible error in failing to grant one. A perjury conviction can not stand on the uncorroborated testimony of only one witness. The State should have instructed the jury as to the proof required in a perjury case regardless of whether or not the defense requested such an instruction. This was reversible error.

==>The trial judge erred in allowing Bob's and his wife's passports into evidence as proof he was out of the country the week before the fire. The passports were not properly authenticated under MRE 901 and 902(3). Bob's passport was obtained using an alias. "We do not agree that a fraudulently obtained passport could be considered authentic on its face for the purposes of establishing the information contained within as factual." The visa stamps within the passports were never authenticated. There were no attestations or testimonial authentication from Turkish officials to show the stamps were valid.

To read the full opinion, click here:
http://www.mssc.state.ms.us/Images/Opinions/CO49312.pdf

Brooks v. State, No. 2007-KA-00978-COA (Miss.App. July 1, 2008)

CRIME: Felony DUI (habitual offender)

DECISION: Affirmed
COUNTY: Lauderdale
MAJORITY: Carlton

FACTS: Joe Louis Brooks was convicted of Third Offense DUI and was sentenced to 5 years without parole. On July 19, 2005, Brooks was pulled over by Officer Mark Chandlee for driving a car with no tag. Brooks had no license on him, but gave the officer his name and social security number. Running the information, it was discovered that Brooks had a suspended license for DUI. Chandlee testified he noticed the smell of alcohol on Brooks and saw he eyes were red and his speech slurred. Brooks admitted to consuming one beer. Another officer arrived as back-up and also noticed the smell of alcohol. Brooks told the second officer he consumed a half a beer. At the jail, a DUI officer also noticed the smell of alcohol, the slurred speech, and red eyes. He also remembered Brooks had poor balance. Brooks refused to submit to any SFSTs and refused to take an Intoxilyzer test.

HELD: The verdict was not against the weight of the evidence. Brooks claimed the evidence was insufficient to show he was under the influence or impaired in any manner. The DUI officer allegedly remembered the details of Brooks's conduct almost two years later when he took no notes and made no written report. However, the jury determines credibility and accepted the officers' testimony.

==>The trial judge did not err in failing to grant an instruction which told the jury it is not illegal to drink and drive in Mississippi. However, there was no evidentiary foundation for the instruction, as Brooks claimed at trial that he consumed no alcohol before driving.

To read the full opinion, click here:
http://www.mssc.state.ms.us/Images/Opinions/CO48347.pdf

Stewart v. State, No. 2006-KA-01528-COA (Miss.App. July 1, 2008)

CRIME: Murder
DECISION: Affirmed
COUNTY: Alcorn
MAJORITY: Ishee (King and Irving concur in result only)

FACTS: Rodarius Bonard Stewart was convicted of murder and was sentenced to life. In 2004, Stewart and several friends arrived at a late-night party in Corinth. An altercation ensued between Stewart and his friends and some other people at the party. Stewart and his friends left the party. As they were driving away, Stewart shot wildly out of the car window, hitting and killing Tyler Grant Hamlin. Stewart's motion for a change of venue was denied. The court found the letters submitted by Stewart's counsel were insufficient to give rise to a legal presumption that a change of venue was necessary. The court went ahead and addressed the merits of the motion and denied relief.

HELD: The trial judge properly denied Stewart's motion for a change of venue. The court found no factors which would make the presumption of a change of venue irrebuttable. This was not a capital case, no crowds threatened violence towards Stewart, and there was not an inordinate amount of media coverage. Although several members of the venire stated they knew the victim or his family, the defense had the opportunity to make challenges against them. Stewart made no motion for additional challenges.

==>The prosecutor did not commit reversible error when he commented that if he had been faced with similar circumstances, he would have sought the help of the police. After objection, the trial judge struck the comments from the record. Stewart failed to cite any authority to support the comments were error.

==>The prosecutor did not improperly interject race into his closing arguments. The comments included:

> "This case has everything to do with race. This case has nothing to do with race. It has everything to do with race in that a black man is accused of killing a white man. It has nothing to do with race because justice is blind. The killer is the defendant. The deceased is the victim..... But it has nothing to do with race because you are white and black. You're male and female. You're young and older. Any you looking at what happened out there, the facts that occurred, is where justice is made."

It is clear the prosecutor was actually attempting to focus the jury's attention on the fact that their duty was to examine the facts, regardless of race, and return a verdict based on the facts.

To read the full opinion, click here:
http://www.mssc.state.ms.us/Images/Opinions/CO47919.pdf

Sawyer v. State, No. 2007-KA-00136-COA (Miss.App. July 1, 2008)

CRIME: Armed Robbery and Possession of a Firearm by a Felon (habitual offender)
DECISION: Reversed and remanded
COUNTY: Hinds
MAJORITY: Griffis (Roberts concurs in result only)

FACTS: Charlie Sawyer was convicted of armed robbery and possession of a firearm by a convicted felon, and was sentenced to life without parole. On June 3, 2005, Alfred Jacobs was robbed in the drive-thru lane of Ellis Seafood in Jackson. On June 11th, employees at Ellis Seafood noticed an armed man in the bushes outside the restaurant and called police. Sawyer was arrested and police discovered he had two prior convictions for armed robbery. Jacobs was asked to view a photo line-up and picked Sawyers out as one of the men who had robbed him. He was indicted for armed robbery and for being a felon in possession of a firearm. Sawyer's motion to sever the counts of his indictment was denied. He offered to stipulate that he was a prior felon, but the court allowed the

State to prove to the jury that he had two prior armed robbery convictions.

HELD: The trial judge abused his discretion in not allowing the defendant to stipulate that he was a prior felon. Although the court did not err in refusing a severance based on the facts of the case, under MRE 403, the evidence of Sawyer's prior armed robbery was more prejudicial than probative. "Indeed, it would be difficult, if not impossible, for the jury to put aside evidence in Count II that Sawyer had twice before committed armed robbery when it considered Count I, regarding Sawyer's guilt of armed robbery on June 3, 2005."

==>It was error to allow the evidence when a valid stipulation was available. "...[T]he trial court abused its discretion because it should have either severed the two counts and tried them separately, or the court should have made the State accept Sawyer's stipulation if the State still desired to try the two counts together." A limiting instruction would not have cured the error here.

To read the full opinion, click here:
http://www.mssc.state.ms.us/Images/Opinions/CO47989.pdf

Ude v. State, No. 2007-KM-00268-COA (Miss.App. July 1, 2008)

CRIME: Misdemeanor - Stalking
DECISION: Reversed and remanded
COUNTY: Oktibbeha
MAJORITY: Barnes

FACTS: Bart Ude was convicted of stalking in justice court. He was sentenced to 6 months, but the sentence was suspended for 2 years. Ude appealed to circuit court and requested a jury trial. The trial judge denied a jury trial, stating he although stalking carried a possible one year jail sentence, he did not intend to sentence the defendant to a year. Ude was attending Mississippi State in 2003. He had no friends or family in the area. LaKeisha Claude, another doctoral student offered to help him with rides to class and to the grocery. They were friends for several months. In February of 2004, Ude sent flowers to Claude and began to visit her at her office. Ude began making comments which made her feel uncomfortable. When she told him this, he initially laughed, but later became angry and violent. He had pizza delivered to her home, sent her other presents, and made repeated phone calls to her. In May, she made an informal complaint to the Dean of Students. The dean talked to Ude, but he denied any harassment and said he did not accept the Dean's directive to stay away from Claude. In July, Claude made a formal complaint. The Dean held another meeting with all parties and the university affirmative action officer. During the meeting, Ude became so agitated and angry that he was escorted out of the meeting. Claude also made a report to the university police. Claude still continued to receive calls from Ude. In September, Ude showed up at Claude's office while she was studying with another student. He became angry and knocked down a chair. Ude left when police were called. Claude testified she had to seek counseling because of the harassment. Claude eventually filed a complaint in justice court. Ude was convicted during the bench trial. In addition to the sentence from justice court, Ude was ordered banished from Oktibbeha County for two years.

HELD: The trial court erred in holding a bench trial over the defendant's objection. Since the maximum punishment for stalking is up to one year, Ude had the right to a jury trial. The circuit court had no discretion to deny him that right.

==>Ude was not denied the right to a speedy trial in circuit court. The claim was raised for the first time on appeal, so the issue is procedurally barred.

==>The evidence was sufficient to support the verdict, so the case should not be reversed and rendered. Although this claim was not raised in any post-trial motion, this was a bench trial. By virtue of the verdict, the court ruled on the sufficiency of the evidence. The evidence showed Ude repeatedly called and visited Claude long after she requested that he stop. Claude had to seek counseling because of the harassment.

To read the full opinion, click here:
http://www.mssc.state.ms.us/Images/Opinions/CO49150.pdf

Watts v. State, No. 2007-CP-00708-COA (Miss.App. July 1, 2008)

CRIME: PCR – Sale of Cocaine
DECISION: Dismissal of PCR affirmed
COUNTY: Forrest
MAJORITY: Carlton (Irving concurs in result only)

FACTS: Carl Dewayne Watts pled guilty in November of 2005 to selling cocaine and was sentenced to 30 years, but the sentence was suspended with certain conditions, including banishment from the Hattiesburg area. In December of 2005, Watts violated the terms of his suspended sentence by being in Hattiesburg. His 30 year sentence was revoked. In September of 2006, Watts filed a motion to vacate his conviction and sentence, which he amended in January of 2007. Watt essentially argued that his sentence was illegal and acted as an incentive for his guilty plea. The circuit court treated his motion as a PCR and summarily dismissed the petition. Watts appealed.

HELD: Watts's sentence was not illegal probation as a prior convicted felon. A suspended sentence for a felon is not illegal as long as it does not involve a period of supervised probation and does not exceed the maximum penalty statutorily prescribed for the offense. His suspended sentence did not equate to probation.

==>The State was correct in asserting that Watts should not be allowed to argue the legality of the sentence he requested only after he was unable to satisfy the conditions attached to the sentence, specifically the banishment provision. "Because the suspended sentence did not prejudice Watts, he cannot now attack it."

==>Watts was not denied effective assistance of counsel. His attorney did not fail to properly advise him regarding the legality of the suspended sentence and the banishment. "We find no deficiency in Watts's attorney bargaining for and obtaining a lenient sentence for Watts." Even if deficient, Watts failed to show any prejudice.

To read the full opinion, click here:
http://www.mssc.state.ms.us/Images/Opinions/CO48282.pdf

Robinson v. State, No. 2007-CP-00296-COA (Miss.App. July 1, 2008)

CRIME: PCR – Armed Robbery
DECISION: Dismissal of PCR affirmed
COUNTY: Marion
MAJORITY: Barnes (Carlton not participating)

FACTS: Anthony Javon Robinson pled guilty in August of 1999 to armed robbery and was sentenced to 25 years with 15 to be served without parole, and the remaining 10 under PRS. In January of 2007, Robinson filed a PCR, which was dismissed by the trial court as time-barred. Robinson appealed.

HELD: The trial court did not err in finding the petition time-barred. The court found no exception to the 3 year statute of limitations. Robinson claimed he only just found out that he was not eligible for earned-time credits, so these facts should be considered newly discovered evidence. He claimed the court never informed him he would not be eligible for earned time until serving 10 years. However, Robinson was convicted after 1994 when the law changed. He is not eligible for parole, so he can not accumulate earned time under §47-5-139(1)(e).

==>Also, although the order denying his PCR has another person's name on it in the beginning, the order refers to Robinson in the conclusion. It is clear the order refers to Robinson's PCR.

To read the full opinion, click here:
http://www.mssc.state.ms.us/Images/Opinions/CO48654.pdf

Campbell v. State, No. 2007-CP-00931-COA (Miss.App. July 1, 2008)

CRIME: PCR – Sale of Cocaine
DECISION: Dismissal of PCR affirmed
COUNTY: Alcorn
MAJORITY: Barnes

FACTS: Russell T. Campbell pled guilty in November of 1999 to selling cocaine and was sentenced to 12 years with 6 suspended and 5 years PRS. As part of the plea, Campbell was not sentenced as an habitual offender. Campbell was released from custody in December of 2003. Campbell was

charged with violating his post-release supervision in August of 2005, for failing to report and failing to pay fees. The order for Campbell's arrest was dismissed in January of 2006. In October of 2006, Campbell's probation was revoked after he was charged with possession of a controlled substance. Campbell filed a PCR in March of 2007, claiming the court illegally suspended his sentence in 1999. The circuit court denied relief and Campbell appealed.

HELD: Campbell's sentence was not illegal. A circuit court can suspended a prior convicted felon's sentence, whole or in part, under §47-7-33, as long as the total sentence does not exceed the statutory maximum for the crime. However, since Campbell was not sentenced as an habitual offender, his sentence is not mandatory. Therefore, he is eligible to receive for earned probation under §47-7-47.

==>Campbell's sentence was not illegally revoked. Campbell claimed the sentencing order informing him of the terms of his probation was not signed by him or his probation officer. However, the oversight did not equate to an illegal revocation. He was not revoked solely for failing to pay his fine and fees, but for committing another crime.

To read the full opinion, click here:
http://www.mssc.state.ms.us/Images/Opinions/CO48782.pdf

Bady v. State, No. 2007-CP-01144-COA (Miss.App. July 1, 2008)

CRIME: PCR – Receiving Stolen Property
DECISION: Denial of PCR reversed and remanded
COUNTY: Lee
MAJORITY: Irving
DISSENT: Carlton, joined by Chandler and Griffis

FACTS: Cornelius Bady pled guilty in May of 2006 to one felony count of receiving stolen property and was sentenced to six years. Bady was charged with receiving a stolen television valued at more than $500. He subsequently filed a motion to set aside his guilty plea which was treated as a PCR. Bady attached a copy of a receipt for the TV which showed it was purchased in August of 2003 for $349.99. A warranty was also purchased for $159.99 at the same time. Bady alleged his attorney was ineffective for letting him plead to a felony. The circuit court denied relief without referring to the receipt. Bady appealed.

HELD: Bady is entitled to an evidentiary hearing to determine if he was denied effective assistance of counsel. It appears from the receipt that Bady was only guilty of a misdemeanor. No one questioned the authenticity of the receipt. At the hearing, the court should determine the authenticity of the receipt and whether or not Bady knew at the time of his plea that the TV was worth less than $500. "Unless Bady's attorney on remand can produce a good reason, which is not readily apparent to us, for allowing his client to plead guilty to a felony on the facts of this case, the attorney's conduct was clearly deficient."

[Carlton dissented, writing that she would defer to the trial court's finding on the ineffective assistance of counsel claim. The record is insufficient to show counsel's conduct was not strategy. It is possible the State could have proven the TV was valued at more than $500 and Bady could have gotten 10 years. His 6 year sentence was concurrent with a possession of cocaine charge, which was consecutive to another charge.]

To read the full opinion, click here:
http://www.mssc.state.ms.us/Images/Opinions/CO46699.pdf

Jones v. State, No. 2006-CP-01880-COA (Miss.App. July 1, 2008)

CRIME: PCR – Violation of Controlled Substances Act
DECISION: Dismissal of PCR affirmed
COUNTY: Hinds
MAJORITY: Myers

FACTS: Jeffery Earl Jones pled guilty in September of 2001 to 5 charges under the controlled substances act. He was sentenced to a total of 18 years with 5 years PRS. Jones filed a PCR in August of 2004, but his petition was denied. Jones filed another PCR in March of 2006, arguing that his sentences were ambiguous and perhaps illegal. The circuit court found his petition frivolous, ordered a deduction of accrued time earned, and dismissed his PCR as a successive writ. Jones appealed.

HELD: The trial judge did not err in finding the petition successive writ-barred. Jones cites no exception to the bar. In addition, Jones's motion is also time-barred.

To read the full opinion, click here:
http://www.mssc.state.ms.us/Images/Opinions/CO48086.pdf